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SARMIINA SDN BHD v. GERRY HO & ORS

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
AZIZAH NAWAWI JCA
S NANTHA BALAN JCA
B [CIVIL APPEAL NO: B-01(NCvC)(W)-102-02-2020]
2 AUGUST 2021

Abstract – *Any person asserting that he is the owner of certain goods, has the right to claim the goods, subject to the proof of his interest, legal or beneficial, in respect of the goods. For the release of seized goods from the Customs Department, the party seeking the release must first establish that it is the owner/consignee of such goods. Failure to do so would result in lack of locus standi, further resulting in the failure of the release sought.*

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CUSTOMS AND EXCISE: *Seizure – Seizure of containers containing alcoholic beverages – Claimant appointed by certain consignors to act as agent in respect of goods – Claimant did not possess requisite import permit to bring imported liquor into Malaysia – Import permit used belonged to another entity – Whether entity consignee/owner of goods – Claimant sought release and return of goods – Whether claimant consignee as per bills of lading – Whether claimant had right to claim for release of goods*

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This was an appeal by the appellant ('plaintiff') against the decision of the High Court Judge ('HCJ') which dismissed the plaintiff's claim. The appeal arose out of the action taken by the officers from the Royal Malaysian Customs Department ('RMCD') to seize alcoholic beverages contained in 17 containers ('goods') at the Free Zone West Port, Port Klang, which was allegedly to be trans-shipped to foreign destinations. It was the plaintiff's case that (i) it was appointed by certain consignors to act as their agent in respect of the goods; (ii) it did not possess the requisite import permit to bring imported liquor into Malaysia and had brought in the goods using the import permit belonging to an entity known as No Signboard Too Enterprise ('NSTE'). The relevant bills of lading stated that NSTE was the consignee of the said goods; and (iii) the officers of the RMCD seized the goods and also eight more containers. However, the eight containers were later released as the name of the consignee was changed from NSTE to a related company, Sarmiina Trade Ventures Sdn Bhd ('STV'). Investigations by the RMCD showed that NSTE maintained that they were not the consignee nor the owner of the goods. The plaintiff sought a release and return of the goods but was informed that it was not the consignee as per the bills of lading and had no right to claim for the release of the goods and therefore, the said goods could not be released to the plaintiff. In the High Court, the plaintiff claimed

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for damages which included RM2,016,960.60 being the value of the goods, RM510,665.70 for detention of the containers and demurrage and RM361,409 for port charges. The plaintiff claimed that (i) its reputation and credibility as an agent to the consignors had been damaged due to the continuous seizure till to-date; and (ii) the consignors were dissatisfied with the services offered by the plaintiff because the plaintiff failed to obtain the release of the goods from the defendants within the stipulated time. The HCJ dismissed the plaintiff's claim on the grounds that, *inter alia*, various parts of the plaintiff's evidence was found to be doubtful or unconvincing. Hence, the present appeal.

Held (dismissing appeal)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) The notice of seizure was not sent to the plaintiff. Rather, it was sent to NSTE and the consignors. The letters in reply from the consignors were found by the HCJ to be fake. The net result was that the plaintiff failed to connect the dots to demonstrate on a balance of probabilities that they were the 'agent' or 'owner' (per s. 2 of the Customs Act 1967) *vis-a-vis* the goods. In the result, the plaintiff failed to establish their *locus standi* to make a claim on the goods. In light of the circumstances and the facts, the actions of the defendants in seizing the goods were lawful. This was particularly so in light of the fact that the named consignee, NSTE, was denying that they were the real consignee or owner of the goods and disowned the authenticity of the 'No Objection Letter'. It was quite apparent that when the seizure was conducted, the defendants had reasonable and probable cause for doing so. They were not flippant or reckless in their conduct. (paras 94 & 95)

(2) In light of the HCJ's adverse finding in regards to the impugned letters which the plaintiff was relying upon, it could only be concluded that the HCJ was implying, without saying so in so many words, that the letters were produced in circumstances which would not vouch for its authenticity. It could not be said that the HCJ's conclusion on this point was one which no reasonable tribunal similarly circumstanced would have arrived at. It was not a finding which was 'plainly wrong' in any sense. (paras 96 & 97)

(3) The plaintiff was incognito and surfaced only after the seizure was carried out. This looked very nefarious and sinister and had all the makings and trappings of an illicit practice within the shipping industry. But that was a matter for the RMCD to address in the appropriate way. The release of the eight containers and the said consignment to STV (which purportedly replaced NSTE as consignee), which was done by the top management of RMCD was not a precedent which had to be followed as the so-called release was not free from controversy. (para 99)

(4) The plaintiff had not satisfied the court that the HCJ had mis-appreciated the evidence and was 'plainly wrong' in arriving at his decision. The HCJ had considered and evaluated the evidence before him and found that the plaintiff failed to prove, on the balance of probabilities, of its claims. There was no error that warranted an appellate intervention. The HCJ, having considered all the evidence, was fully entitled to reach his evaluative judgment. The plaintiff failed to prove, on a balance of probabilities, that they had the requisite *locus standi* to make a claim with respect to the said goods. The defendants had reasonable and probable cause for seizing the 17 containers and the said goods. (paras 106 & 108)

Case(s) referred to:

Jabatan Kastam DiRaja Malaysia & Ors v. Apple International Co Ltd (Japan) [2017] 8 CLJ 140 CA ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

Modern Freight Express v. Afzarizzal Abdul Wahab & Ors [2017] 8 CLJ 425 CA ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***

Soong Chee Kong v. PP [1950] 1 LNS 84 HC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Customs Act 1967, ss. 2, 128(2), (3), (4), 132
Customs Enactment 1937, s. 108
Customs Regulations 1977 (repealed), regs. 18, 19(3)
Evidence Act 1950, s. 114(g)
Federal Constitution, art. 13

For the plaintiff - JR Ravendren & Agalya J Munusamy; M/s JR Ravendren & Assocs
For the defendants - Noerazlim Saidil; SFC & Natrah Mazman; FC; State Legal Advisor, Selangor

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: BA-21NCVC-55-08-2018 (affirmed).]

Reported by Lina E

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] This is an appeal by Sarmiina Sdn Bhd (No. Pendaftaran Syarikat 150035-K) ("plaintiff") against the decision of the learned judge ("judge") of the High Court at Shah Alam dated 17 January 2020 after a full trial, which dismissed the plaintiff's claim with costs of RM25,000.

[2] The appeal arises out of the action taken by officers from the Royal Malaysian Customs Department ("RMCD") on 10 August 2017 to seize 17 containers which were located at the Free Zone West Port, Port Klang, which contained imported liquor which was (allegedly) to be trans-shipped to foreign destinations. The plaintiff filed High Court Shah Alam Suit No. BA-21NCVC-55-08-2018 ("Suit 55") and sought the following reliefs against the defendants:

a. Satu deklarasi bahawa penyitaan barang kepunyaan plaintif oleh defendan-defendan secara berterusan mulai 10.8.2017 sehingga kini adalah menyalahi undang-undang dan dengan demikian adalah tidak sah;

b. Ganti rugi khas berjumlah RM2,889,035.30 yang merangkumi nilai barang tersebut, kos penahanan dan kos penyimpanan;

c. Ganti rugi am;

d. Ganti rugi Teladan;

e. Faedah pada kadar lima peratus (5%) atas jumlah bayaran yang diperintahkan dibayar dibawah Perenggan 1, 2, 3 dan 4 diatas dari tarikh pemfailan Writ ini sehingga penyelesaian penuh;

f. Kos tindakan ini; dan

g. Lain-lain relif dan selanjutnya yang dianggap sesuai dan manafaat oleh Mahkamah yang Mulia ini.

[3] On 2 August 2021, we heard the appeal. We were satisfied that there were no merits in the appeal. We, therefore, affirmed the decision of the judge and dismissed the appeal accordingly. Our reasons for dismissing the appeal now follow. For convenience, we shall refer to the appellant and respondents by their titles in the High Court, namely as "plaintiff" and "defendants" respectively. Where the context requires, the investigating officers from RMCD, *ie*, first, second and third defendants shall be referred to by their abbreviated titles as "D1", "D2" and "D3" respectively. During the trial, D1, D2 and D3 testified as "DW4", "DW1" and "DW2" respectively. To avoid confusion, they will be referred to as D1, D2 and D3 respectively.

The Background Facts

[4] The plaintiff's case is that between June and July 2017, (i) JGL Pte Ltd, Singapore (ii) Zaac Holding Pte Ltd, Singapore, (iii) Apollon Enterprise, Singapore, (iv) Bavaria NV, Netherlands and (v) Brouwerij Martens NV, Belgium ("consignors") had appointed them to act as their "agent" in respect of the alcoholic beverages contained in 17 containers ("the said goods") which were sent from abroad to the free zone in West Port, Port Klang, allegedly for the purpose of re-exportation to other countries.

[5] At all material times, the plaintiff did not possess the requisite import permit pursuant to Item 67 of Part 1 of the Third Schedule – Customs (Prohibition of Imports) Order 2017 ("the import permit") to bring imported liquor into Malaysia.

[6] The plaintiff claims that they had brought in the said goods using the import permit belonging to an entity with a curious name – "No Signboard Too Enterprise" ("NSTE"). The relevant bills of lading states that NSTE is the consignee of the said goods. On 10 August 2017, customs officers from the Enforcement Division of the RMCD Johore Bahru seized the 17 containers containing the said goods at the Container Yard of Westport, Port Klang. D1, D2 and D3 were the investigating officers who carried out the investigations and seizure of the said goods in the 17 containers. Around the same time, officers from RMCD Selangor had also seized eight containers which were brought into the Free Zone West Port containing imported liquor. These eight containers were also brought in *via* bills of lading which state that NSTE is the consignee. The eight containers are not the subject of Suit 55. However, the eight containers are nevertheless relevant as these containers were later released after the name of the consignee was changed from NSTE to a related company, namely Sarmiina Trade Ventures Sdn. Bhd. ("STV"). This is dealt with elsewhere in the judgment.

RMCD's Police Report

[7] On 11 August 2017, Mohd. Nasir bin Mohd. Nor (Senior Customs Officer) ("Nasir") (RMCD Johore Bahru) lodged a police report in regard to the seizure of the said goods. Nasir did not testify at the trial. Nasir's police report reads as follows:

> Tarikh: 11/08/2017
> Nama: Mohd Nasir bin Mohd Nor
> No. K/P: 590227085655
> Pekerjaan: Pegawai Kanan Kastam
>
> Pada 08/08/2017 kira-kira jam 11.00 pagi, sepasukan anggota kastam dari Unit Operasi JKDM Johor Bahru bersama-sama dengan anggota pasukan NNRET telah membuat pemeriksaan keatas 17 buah kontena di Container Inspections Centre (CT7) Westports Malaysia Sdn Bhd, Pelabuhan Klang Selangor. Pemeriksaan telah dibuat bersama-sama wakil Shipping Line dari Mitsui O.S.K. Lines (Malaysia) Sdn Bhd, Maersk (Malaysia) Sdn. Bhd., Cosco Shipping Lines (M) Sdn Bhd, Asian Shipping Freight Liner (M) Sdn Bhd, Evergreen Marine Corp (Malaysia) Sdn Bhd, dan Hapag-Llyod (Malaysia) Sdn Bhd. Semua Shipping Line tersebut adalah pemilik kontena box yang diperiksa. *Hasil daripada siasatan awalan yang dibuat keatas shipping line tersebut mendapati consignee untuk 17 kontena tersebut iaitu No Signboard Too Enterprise tidak mengaku yang mereka adalah consignee untuk konsaimen tersebut.*

Pasukan turut mendapat pengesahan dari pengarah syarikat No Signboard Too Enterprise yang menafikan 17 kontena tersebut adalah milik mereka. Hasil pemeriksaan yang dibuat di hadapan wakil shipping line terlibat pasukan dapati semua kontena tersebut berisi minuman keras. Pasukan telah merujuk hasil pemeriksaan yang dibuat kepada Timbalan Ketua Pengarah Kastam Penguatkuasaan dan beliau mengarahkan pasukan agar menyita semua kontena yang diperiksa bersama muatannya dan dibawa balik ke pejabat bagi siasatan selanjutnya. Pada 10/08/2017 pasukan telah menyita kesemua 17 kontena terlibat dan notis penyitaan telah diserahkan kepada semua shipping line yang terlibat. Kontena yang disita adalah MOAU0571950, TEMU0586026, MOAU0507652, CKU2333038, MRSU0099501, MRKU9307413, MRKU9551760, BHU5671111, SEGU3168867, UNXU3002751, EISU3683214, GLDU2895400, LTIU3031112, TEMU3942429, EITU0390469, TCLU3374194 dan HLXU3451720. Semua kontena serta muatannya telah dibawa balik ke pejabat dan diserahkan kepada pegawai penyiasat bertugas untuk tujuan siasatan selanjutnya. Sekian laporan saya.

(emphasis added)

[8] Essentially, the investigations which were carried out by the RMCD through D1, D2 and D3 revealed that liquor was brought into Malaysia *via* the 17 containers wherein the name of NSTE was used as "consignee" but NSTE maintained that they are not the consignee of the said goods and are not the owners of the said goods. NSTE had the requisite import permit to import liquor. But it is necessary to mention that the brands of liquor listed in NSTE's import permit did not tally with the brands of liquor in the 17 containers. At any rate, the plaintiff maintains that they had "used" NSTE's import permit to bring in the said goods *via* the 17 containers.

[9] The plaintiff was made aware or become aware of the seizure and promptly instructed their solicitors to make a claim in writing to the investigating officers for the release of the 17 containers and the said goods. By way of letters dated 5 September 2017, 27 October 2017 and 13 November 2017, the plaintiff's previous solicitors, Messrs Azamuddin & Co ("Azamuddin") gave written notice to the defendants seeking the release and return of the said goods and the 17 containers. According to RMCD, they had asked the solicitor from Azamuddin to attend at their office to assist in the investigations, but no one from Azamuddin turned up at RMCD's office. There was no witness from Azamuddin during the trial.

[10] At any rate, Azamuddin's letter dated 5 September 2017 (with emphasis added) reads as follows:

A

AZAMUDDIN & CO.
ADVOCATES & SOLICITORS
PEGUAMBELA & PEGUAMCARA
Tingkat Satu, No. 23, Jalan Unggul 25/40, Seksyen 25, Taman Sri Muda, 40400 Shah Alam Selangor

B

Tarikh 5.9.2017

Ruj. Kami: ANC/FL/1
Ruj Tuan:

Penolong Kanan Pengarah Kastam
Jabatan Kastam DiRaja
C Kompleks Penguatkuasaan Kastam Sg Pulai
81560 Gelang Patah Johor

Tuan

Notis Sitaan kepada Sarmiina Sdn Bhd

D Dengan segala hormatnya perkara diatas dirujuk dimana kami telah dilantik untuk mewakili **Sarmiina Sdn Bhd.**

2. Atas arahan anak guam kami, kami dimaklumkan sebanyak 17 kontena telah ditahan di West Port sekitar bulan Ogos 2017 dan sehingga kini tiada sebarang tindakan dari pihak tuan untuk mengeluarkan Notis Sitaan kepada Sarmiina Sdn Bhd.

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3. Kami memohon agar pihak tuan dapat **mengeluarkan Notis Sitaan** keatas kontena-kontena tersebut **kepada penama diatas yang telah di lantik oleh 5 syarikat perkapalan iaitu:**

1) Brouwerij Martens

F 2) Zaac Holdings Pte Ltd

3) Bavaria N.V

4) JGL Pte Ltd

5) Apollon Enterprise

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4. Untuk kesenangan pihak tuan, disenaraikan 17 kontena yang terlibat seperti di bawah:

1) MOAU0571950

2) TEMU0586026

H 3) SEGU3168867

4) TCLU3374194

5) TCKU2333038

6) CBHU5671111

I 7) HLXU3451720

8) MOAU0507652

9) MRKU9307413
10) MRKU9551760
11) MRSU0099501
12) EISU3683214
13) GLDU2895400
14) LTIU3031112
15) UNXU3002751
16) EITU0390469
17) TEMU3942429

Sekian Terima Kasih

AZAMUDDIN & CO

[11] Sometime in December 2017, the plaintiff's representative, one Saravanan a/l Chellappan ("PW1") met with D1 at his office to inquire about the status of the plaintiff's claim with respect to the said goods in the 17 containers but was informed by D1, who was also speaking on behalf of D2 and D3, that they (plaintiff) were not the consignees per the bills of lading and that they had no right to claim for the release of the said goods and therefore the said goods cannot be released to the plaintiff.

[12] As mentioned earlier, around the same time the Enforcement Division from RMCD Selangor had seized eight containers of alcoholic beverages ("said consignment") which had been brought into Port Klang from overseas (apparently) by the plaintiff using NSTE's import permit. In February 2018, the Enforcement Division from RMCD, Selangor allowed the plaintiff's claim for the release of the said consignment (the eight containers). Thereafter, the plaintiff was allowed to re-export the said consignment by changing the consignee's name in the bill of lading from NSTE to STV.

[13] It is material to note that PW1 is a director of the plaintiff and STV. The plaintiff is aggrieved that RMCD Johor Bahru's stance *vis-à-vis* the 17 containers and the said goods was diametrically opposite to the stance taken by RMCD Selangor.

[14] In April 2018, the consignors received seizure notices dated 1 April 2018 and 15 April 2018 pertaining to the said goods from the defendants. By letters dated 25 April 2018 and 4 May 2018, the consignors purportedly notified the defendants that the plaintiff is acting on their behalf to claim the said goods and had appointed STV as the valid import permit holder in Malaysia for the said goods.

[15] The plaintiff further avers that the continuous seizure of the said goods by the defendants since 10 August 2017 without referring the plaintiff's claim to the Magistrate's Court upon the expiry of one calendar month from the date of the claim is unlawful and illegal. Therefore, it is alleged that the seizure of the said goods in the 17 containers is unlawful and in contravention of art. 13 of the Federal Constitution. It is alleged that as a direct result of the seizure of the said goods, the plaintiff has suffered losses. The plaintiff contends that they are lawfully entitled to claim for the value of the said goods and incidental costs such as detention, demurrage and storage costs.

[16] On 1 June 2018, the plaintiff's solicitors Messrs J R Ravendren & Associates sent a letter of demand ("LOD") to the defendants claiming damages amounting to RM2,889,035.30. The LOD reads as follows:

> Tarikh: 1 Jun 2018
>
> Pengarah Kastam Negeri Johor
> Tingkat 13, Menara Kastam
> Larkin, Karung Berkunci 780
> 80990 Johor Bahru
> Johor Darul Takzim
>
> Tuan,
>
> **Per: Notis Tuntutan**
> **Pihak Yang Menuntut: Sarmiina Sdn Bhd**
>
> Kami merujuk kepada perkara diatas. Kami mewakili Sarmiina Sdn Bhd yang beralamat di No. 40-01, Jalan Setia Tropika 1/24, Taman Setia Tropika, 81200, Johor Bahru, Johor Darul Takzim (selepas ini dirujuk sebagai 'anakguam kami') didalam perkara diatas.
>
> Kami diarah oleh anakguam kami bahawa anakguam kami telah memohon untuk pelepasan 17 buah kontena yang mengandungi minuman keras ('barang tersebut') melalui surat bekas peguam nya Tetuan Azamuddin & Co bertarikh 5.9.2017, 27.10.2017 dan 13.11.2017 tetapi sehingga hari ini barang tersebut masih belum dilepaskan kecuali kontena-kontena kosong sahaja.
>
> Kami diarah memaklumkan bahawa penyitaan minuman keras tersebut secara berterusan oleh pihak tuan sehingga kini adalah menyalahi undang-undang walaupun anakguam kami telah membuat satu tuntutan yang sewajarnya. Akibat daripada penyitaan barang tersebut oleh pegawai-pegawai tuan iaitu En. Gerry Ho dan En Ahmad Syukri bin Zolkiflee, anakguam kami telah mengalami kerugian sebanyak RM2,889,035.30 yang merangkumi nilai barang, caj pelabuhan dan caj penahanan kontena setakat kini dan yang masih berterusan.
>
> SILA AMBIL PERHATIAN bahawa adalah arahan anakguam kami untuk menuntut RM2,889,035.30 sebagai pampasan/ganti rugi akibat tindakan penyitaan barang tersebut dengan menyalahi undang-undang. Jika pihak tuan gagal dan/enggan membayar jumlah tuntutan tersebut dalam tempoh masa 14 hari dari tarikh surat ini, maka adalah arahan

anakguam kami untuk merujuk tuntutannya ke Mahkamah untuk menuntut ganti rugi khas, ganti rugi am, ganti rugi teladan serta faedah dan kos.

Sekian, terima kasih.

Yang benar

Tetuan JR. Ravendren & Associates,

[17] RMCD Johore Bahru responded to the LOD *via* letter dated 12 June 2018 which reads as follows:

Tetuan JR Ravendren & Associates
Peguambela & Peguamcara
Suite 8717, 7th Floor
Block B, Kelana Square
No 17 Jln SS7/26, Kelana Jaya,
47301 Petaling Jaya
Selangor

Tetuan,

Per: Notis Tuntutan
Pihak Yang Menuntut: Samiina Sdn Bhd

Saya dengan segala hormatnya diarah merujuk surat tuan rujukan JR/903/18 bertarikh 1 Jun 2018 mengenai perkara di atas.

2. Adalah dimaklumkan bahawa satu notis sitaan dibawah s. 114 Akta Kastam 1976 telah dikeluarkan kepada pengurus syarikat NO SIGNBOARD TOO ENTERPRISE beralamat di No. 40, Jalan PSK 8, Pusat Perdagangan Sri Kembangan, 43300 Sri Kembangan, Selangor pada 10 Ogos 2017 iaitu nama consignee didalam Bil of lading dan Manifes Kastam.

3. Pihak Jabatan mempunyai alasan-alasan yang munasabah untuk membuat penyitaan 17 kontena yang mengandungi minuman keras dibawah s. 114 Akta Kastam 1967 yang berbunyi seperti berikut:

3.1. (1) Semua barang-barang yang berkenan dengannya telah terdapat, atau terdapat, sebab munasabah untuk mengesaki bahawa telah dilakukan apa-apa kesalahan terhadap Akta ini atau mana-mana peraturan yang dibuat di bawahnya, atau apa-apa pelanggaran mana-mana peruntukan Akta ini atau mana-mana peraturan yang dibuat di bawahnya atau apa-apa sekatan atau syarat yang tertakluk kepada atau ke atasnya apa-apa lesen atau permit telah diberi, bersama-sama dengan apa-apa bekas, bungkusan, kenderaan, vesel yang tidak melebihi dua ratus tanan bersih berdaftar atau pesawat udara selain daripada pesawat udara yang digunakan dalam pengangkutan antarabangsa, yang mana di dalamnya barang-barang itu mungkin dijumpai atau yang digunakan berhubungan dengan kesalahan atau pelanggaran itu,

A dan apa-apa buku atau dokumen yang dengan munasabah di percayai sebagai mempunyai kaitan terhadap kes itu, boleh disita oleh mana-mana pegawai kastam dalam mana-mana tempat sama ada di darat atau dalam perairan wilayah.

4. Berkaitan dengan anakguam kamu yang mengalami kerugian sebanyak B RM2,889,035.30 pihak jabatan ingin menarik perhatian tetuan kepada s. 132 Akta Kastam 1967 seperti berikut:

4.1. Tiada kos bagi kerosakan yang berbangkit daripada penyitaan boleh didapatkan melain jika penyitaan dibuat tanpa sebab yang munasabah atau sebab yang mungkin.

C Tiada seorang pun dalam mana-mana prosiding di mana-mana mahkamah berkenaan dengan penyitaan apa-apa barang pada menjalankan atau merupa sebagai menjalankan apa-apa kuasa yang diberi dibawah Akta ini, berhak terhadap kos prosiding itu atau apa-apa gantirugi atau relief lain selain daripada suatu perintah bagi pemulangan barang-barang itu atu pembayaran nilainya melain jika penyitaan itu dibuat tanpa sebab yang D munasabah atau sebab yang mungkin.

5. Sehubungan dengan itu, adalah dimaklumkan anakguam kamu tidak mempunyai "*locus standi*" ke atas kes ini dan tidak layak membuat tuntutan atau mewakili mana-mana syarikat untuk menuntut barang-barang didalam 17 kontena atas sebab tidak mempunyai nama di dalam E bill of lading dan Manifes Kastam semasa dan selepas pengimportan.

6. Sebarang pertanyaan berkenaan tarikh dan masa pejumpaan ini, boleh diajukan kepada Penolong Kanan Pengarah Kastam (P), Tuan Ali Bin Abdullah di talian telefon bimbit 0137949800.

Sekian, terima kasih

F "BERKHIDMAT UNTUK NEGARA"

(ALI BIN ABDULLAH)

Cawangan Siasatan
b.p. Pengarah Kastam Negeri
G JOHOR BAHRU
12/6/18

NSTE's Position

[18] On 4 August 2017, a Director of NSTE, Visvalingam a/l Balakrishnan ("SD3") lodged a police report which reads as:

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Tarikh: 04/08/2017
Nama: Visvalingam a/l Balakrishnan
Pekerjaan: Pengarah Syarikat
Alamat Tempat Tinggal:

I No Signboard Too Enterprise No. 74
Lorong Sanggul 1E Bandar Puteri 41200
Klang Selangor

Pengadu Menyatakan:

pada 10/07/2017 @ jam lebih kurang 1000 hrs semasa saya berada di pejabat dialamat no signboard Too Enterprise No. 74 Lorong Sanggul 1E Bandar Puteri 41200 Klang Selangor, saya telah menerima banyak email dari syarikat shipping line yang menghantar notice of arrival (NOA) mengatakan terdapat 20 container yang menggunakan nama syarikat saya.

Senarai container tersebut ialah:

1. CLHU 3718462 S
2. TCLU 2646810 S
3. MOAU 0571950 J
4. TEMU 0586026 J
5. SEGU 3168867 J
6. TCLU 3374194 J
7. CBHU 5671111 J
8. CXDU 1697592 S
9. TCKU 2333038 J
10. HLXU 3451720 J
11. MOAU 0567652 J
12. MRKU 9307413 J
13. MRKU 9551760 J
14. MRSU 0099501 J
15. UNXU 3002751 J
16. EITU 0390469 J
17. TEMU 3942429 J
18. EISU 3683214 J
19. GLDU 2895400 J
20. LTIU 3031112 J

Saya datang ke balai buat laporan adalah untuk menafikan semua container tersebut bukan milik syarikat saya dan saya tidak mahu bertanggungjawab terhadap container tersebut jika berlaku apa-apa kerugian. Sekian laporan saya.

[19] DW3 also gave a sworn statement *via* a statutory declaration dated 28 August 2017 which reads as follows:

Surat Akuan

Saya ... Visvalingam a/l Balakrishnan ... (No K/P: ... 791231-14-6095...) yang bekerja di No Signboard Too Enterprise sebagai Pengarah Syarikat beralamat ... No 74 Jalan Sanggul 1E, Bandar Puteri 41200 Klang Selangor ... dengan sesungguh dan sebenarnya mengaku bahawa:

Pada 10/07/2017 @jam lebih kurang 10.00 pagi semasa saya berada dipejabat dialamat No. Signboard Too Enterprise. No. 74, Lorong Sanggul 1E, Bandar Puteri 41200 Klang, Selangor. Saya telah menerima banyak email dari syarikat shipping line yang menghantar Notice Of Arrival (NOA) mengatakan terdapat 20 container yang menggunakan nama syarikat saya.

Senarai container tersebut ialah:

CLHU 3718462

TCLU 2646810

MOAU 0571950

TEMU 0586026

SEGU 3168867

TCLU 3374194

CBHU 5671111

CXDU 1597592

TCKU 2333038

HLXU 3451720

MOAU 0567652

MRKU 9307413

MRKU 9551760

MRSU 0099501

UNXU 3002751

EITU 0390469

TEMU 3942429

EISU 3683214

GLDU 2895400

LTIU 3031112

Saya datang membuat akuan sumpah dan menafikan semua container tersebut bukan milik syarikat saya. Saya tidak mahu bertanggungjawab terhadap container tersebut jika berlaku apa-apa kerugian.

[20] In the High Court, the plaintiff claimed for damages which included RM2,016,960.60 being the value of the said goods, RM510,665.70 for detention of the containers and demurrage up to 11 April 2018 and RM361,409 for port charges. The plaintiff further claimed that its reputation and credibility as an agent to the consignors has been damaged due to the continuous seizure till to-date. According to the plaintiff, the consignors were dissatisfied with the services offered by the plaintiff because they (the plaintiff) had failed to obtain the release of the said goods from the defendants within the stipulated time.

The Issues For Trial

[21] The issues for determination at trial were as follows:

Isu-isu Untuk Dibicarakan

1. Sama ada penyitaan barang-barang oleh defendan-defendan semenjak 10.8.2017 sehingga kini adalah tanpa sebab-sebab yang munasabah dan mungkin dan dengan demikian menyalahi undang-undang serta tidak sah.
2. Adakah plaintif mempunyai *locus standi* untuk menuntut barang-barang yang telah disita oleh defendan-defendan.
3. Jika penyitaan oleh defendan-defendan adalah tidak sah, adakah plaintif layak menuntut ganti rugi am, ganti rugi khas dan ganti rugi teladan daripada defendan-defendan.
4. Adakah plaintif berjaya membuktikan quantum ganti rugi seperti yang diplidkan dalam Pernyataan Tuntutannya bertarikh 18.7.2018.

Witnesses At Trial

[22] The following witnesses testified at the trial.

Plaintiff's witnesses

Saravanan a/l Chellapan (Plaintiff)	PW1
Muhammad Sallehuddin bin Ramli	PW2
Sritharan a/l Nadarajah	PW3
Sugumaran a/l Govendasamy	PW4
Alex Lim Jia Min	PW5
Md. Halim bin Md. Yusop @ Yusof	PW6
Hew Fook Yoong	PW7
Tai Mee Yong	PW8

Defendants' witnesses

Ahmad Syukri bin Zolkiflee (D2)	DW1
Nur Amin bin Abdullah (D3)	DW2
Visvalingam a/l Balakrishnan (NSTE)	DW3
Gerry Ho (D1)	DW4

High Court – Grounds Of Judgment

[23] The judge's reasons for dismissing the plaintiff's claim are encapsulated in the grounds of judgment. For convenience, the relevant parts of the grounds of judgment (with emphasis added) are reproduced hereinbelow. It is obvious enough from a reading of the grounds of judgment that the judge founds various parts of the plaintiff's evidence to be doubtful or unconvincing.

> [20] Di dalam pliding, plaintif memohon deklarasi bahawa penyitaan barangan kepunyaan plaintif oleh pihak defendan salah di sisi undang-undang dan tidak sah. Bagi membuktikan tuntutan, plaintif telah memanggil 8 orang saksi. Daripada 8 orang saksi tersebut, seorang saksi adalah pengarah plaintif sendiri iaitu Saravanan a/l Chellapan (SP1). Lima orang saksi daripada Jabatan Kastam iaitu SP2 hingga SP6 dan 2 orang saksi daripada konsainor-konsainor tersebut, iaitu SP7 dan SP8.
>
> [21] Menurut keterangan SP1, plaintif tidak mempunyai lesen import minuman keras pada bulan Mei 2017. SP1 secara jelas menyatakan bahawa plaintif telah menggunakan lesen import kepunyaan orang lain untuk membawa masuk minuman keras ke Pelabuhan Klang. Semasa disoal balas oleh Peguam Kanan Persekutuan (PKP) yang mewakili pihak defendan, SP1 tahu dan mengakui bahawa mengimport barangan menggunakan lesen pihak Iain adalah satu kesalahan di bawah undang-undang.
>
> [22] SP1 telah menamakan NSTE sebagai pemegang lesen yang digunakan plaintif untuk membawa masuk kontena-kontena tersebut yang mana termasuklah 17 buah kontena tersebut, selari dengan apa yang di plid di perenggan 8 pernyataan tuntutan. Menurut pliding, perkhidmatan NSTE digunakan untuk menguruskan kemasukan minuman keras pelbagai jenama ke kawasan zon bebas, Pelabuhan Barat, Pelabuhan Klang, termasuk menyediakan perkhidmatan logistik.
>
> [23] Ironinya, NSTE secara tegas menyatakan sebaliknya. Malahan SD3, iaitu pengarah dan pemilik NSTE menafikan sebarang kaitan dengan pengimportan minuman keras di dalam kontena-kontena tersebut. SD3 telah membuat satu laporan polis seperti mana yang dapat dilihat di muka surat 146 Ikatan Dokumen Bersama (Ikatan B). SD3 secara jelas menafikan penglibatan NSTE dan SD3 tidak mahu bertanggungjawab terhadap kontena-kontena tersebut.

[24] Bukan setakat buat laporan polis, SD3 juga turut menghantar sepucuk surat bertarikh 10.7.2018 kepada Jabatan Kastam Johor seperti mana yang dapat dilihat di muka surat 240-241 Ikatan B. Di dalam surat tersebut, SD3 dengan jelas menyatakan bahawa terdapat beberapa individu yang telah menggunakan nama syarikatnya serta menafikan pengetahuan dan milikan ke atas 17 buah kontena tersebut.

[25] Bagi menguatkan penafian, SD3 turut mengikrarkan satu surat akuan bersumpah bertarikh 28.8.2017 seperti mana yang dapat dilihat di muka surat 242-243 Ikatan B. SD3 tidak pernah menyatakan sama ada menerusi keterangan dokumentari atau pun melalui keterangan di mahkamah bahawa plaintif adalah individu yang telah menggunakan lesennya untuk mengimpox kontena-kontena tersebut.

[26] Selain daripada itu, adalah didapati bahawa *keterangan SP1 berhubung dengan pemilikan minuman keras di dalam 17 buah kontena tersebut sangat meragukan. Terdapat percanggahan yang nyata di dalam keterangan yang dikemukakan semasa plaintif cuba membuktikan tuntutan. Plaintif buat dakwaan bahawa minuman keras di dalam 17 buah kontena tersebut adalah miliknya dengan cuba kemukakan dokumen pembelian. Pada masa yang sama, plaintif turut mendakwa bahawa dia adalah agen atau wakil kepada konsainor-konsainor bagi tujuan membuat tuntutan dan pelepasan minuman keras yang disita pihak defendan.*

[27] Menurut SP1, setelah menerima notis-notis sitaan daripada pihak defendan pada sekitar bulan April 2018, konsainor-konsainor telah mengutus surat memberi notis kepada pihak defendan menyatakan bahawa mereka melantik plaintif sebagai agen mereka dan STVSB sebagai pemegang lesen import di Malaysia bagi tujuan membuat tuntutan dan menguruskan pelepasan minuman keras di dalam 17 buah kontena tersebut. Surat-surat pelantikan tersebut dapat dilihat di muka surat 183 hingga 192 Ikatan B.

[28] Plaintif tidak sepatutnya berdolak-dalik (blow hot and cold) di dalam mengemukakan dan membuktikan tuntutan. *Sekiranya benar plaintif telah membeli kesemua minuman keras di dalam 17 buah kontena tersebut, sudah tentulah kesemua minuman keras tersebut menjadi milik plaintif. Oleh itu, adalah didapati bahawa tidak ada keperluannya untuk konsainor-konsainor tersebut melantik plaintif bagi membuat tuntutan bagi pelepasan minuman keras yang ada di dalam 17 buah kontena tersebut.*

[29] *Berdasarkan percanggahan keterangan tersebut, timbul keraguan ke atas dakwaan plaintif yang mendakwa bahawa dia ialah pemilik minuman keras di dalam 17 buah kontena tersebut.* Adalah didapati bahawa alasan berkenaan pelantikan plaintif sebagai agen kepada konsainor-konsainor tersebut jelas bertentangan dengan pliding plaintif sendiri. Harus diingat, *di dalam permohonan untuk mendapatkan perintah deklarasi plaintif telah menyatakan bahawa minuman keras yang disita pihak defendan adalah miliknya dan bukannya mewakili konsainor-konsainor tersebut untuk buat tuntutan pelepasan.*

A [30] Tambahan pula, *mahkamah turut membuat penelitian ke atas keterangan SP1, SP7 dan SP8 serta bukti dokumentari yang dapat dilihat di muka surat 183 hingga 192 Ikatan B. Hasil penelitian, adalah didapati bahawa alasan berkait dengan perwakilan plaintif juga meragukan. Ini adalah kerana kesemua surat daripada 5 konsainor yang berbeza mempunyai ungkapan yang sama sekali serupa.* Setiap surat di dua perenggan terakhir berbunyi:

B

> We had appointed our agent Sarmiina Sdn Bhd and Sarmiina Trade Venture Sdn Bhd in Malaysia to secure the release of the seized goods. We confirm that they had sent a few letters through their solicitor on 5/8/2017, 27/10/ 2017 and 13/11/2017 to claim and secure the release of the seized goods but however there was no response from you to our agents claim. We are deeply disappointed that you had not responded to our agent's request for the release of the seized goods. Please take note that Sarmiina Sdn Bhd and Sarmiina Trade Venture Sdn Bhd are our appointed and authorised agents on record to claim and secure the release of the seized goods in the containers.

C

D

[31] Daripada fakta tersebut, bolehlah dibuat inferens bahawa surat-surat tersebut datangnya daripada penghantar yang sama walau pun menggunakan kepala surat yang berbeza. Adalah mustahil atau tidak akan wujud kebarangkalian untuk lima syarikat daripada pelbagai negara akan menggunakan perkataan-perkataan atau ayat-ayat yang sama sekali serupa ketika melantik plaintif sebagai wakil mereka. *Daripada inferens tersebut, besar kebarangkaliannya surat-surat perwakilan tersebut adalah rekaan semata-mata dan ianya lebih kepada suatu tindakan yang difikirkan semula (afterthought) untuk menyokong tuntutan yang dibuat plaintif.*

E

F

[32] Begitu juga dengan keterangan tentang pelantikan STVSB sebagai agen oleh konsainor-konsainor. Walau pun STVSB mempunyai lesen import pada masa perwakilan dibuat, tindakan tersebut tidak sama sekali boleh mengesahkan bahawa minuman keras di dalam 17 buah kontena tersebut adalah milik plaintif. Lagi pun, penggunaan lesen import tidak boleh dikebelakangkan kesannya. Suatu lesen import diperlukan pada masa barangan diimport dan bukannya selepas barangan di dalam 17 buah kontena tersebut tiba dan berada di pelabuhan.

G

[33] Seperkara lagi, SP1 di dalam keterangannya telah merujuk kepada 'No Objection Letter' yang dikatakan dikeluarkan NSTE kepada D4 dan Pengarah Kastam Selangor untuk pertukaran nama konsaini pada borang 'Manifest' daripada nama NSTE kepada STVSB seperti mana yang dapat dilihat di muka surat 175 hingga 176, 181 dan 182 Ikatan B. Susulan daripada surat tersebut, Kastam Selangor dikatakan telah melepaskan 8 buah kontena yang turut disita di Pelabuhan Barat, Pelabuhan Klang kepada plaintif. Lihat jawapan kepada soalan 13, 16 dan 17 pernyataan saksi SP1. Sekali lagi,

H

I

keterangan SD3 sangat relevan diberikan perhatian. Di dalam keterangannya, SD3 secara jelas menafikan telah menurunkan tandatangan pada ketiga-tiga 'No Objection Letter' tersebut. SD3 dengan tegas menyatakan bahawa tandatangan-tandatangan yang ada pada ketiga-tiga surat tersebut bukan miliknya.

[34] Setelah diteliti, ternyatalah bahawa keterangan SD3 benar. Tanda tangan SD3 seperti yang dapat dilihat pada laporan polis di muka surat 147 Ikatan B, surat kepada D4 di muka surat 241 Ikatan B dan surat akuan bersumpah di muka surat 243 Ikatan B adalah sama sekali berbeza dengan tanda tangan yang ada pada ketiga-tiga 'No Objection Letter' yang dikemukakan plaintif. Perbezaan tersebut sangat ketara walaupun hanya dilihat dengan mata kasar dan tidak perlu kepada analisis pakar tulisan untuk dibuktikannya. Dengan itu, jelaslah bahawa *plaintif bergantung kepada dokumen yang di sengaja ada-adakan bagi membuktikan tuntutan. Penggunaan dokumen yang dipalsukan adalah suatu kesalahan di bawah perenggan 133(1)(c) Akta Kastam 1967 dan sudah tentulah akan memudaratkan tuntutan plaintif.*

[35] Akhirnya, SP1 juga mendakwa bahawa plaintif terlibat membawa masuk 17 buah kontena tersebut ke dalam zon bebas Pelabuhan Barat, Pelabuhan Klang untuk tujuan transit dan akan dieksport semula kepada pelanggan di negeri-negeri lain. Lihat jawapan kepada soalan 2 dan 3 pernyataan saksi SP1. Namun begitu, *menurut keterangan dokumentari iaitu pengikraran dagangan dalam semua dokumen 'inward manifest' yang dikemukakan jelas menunjukkan bahawa konsainan adalah untuk diimport masuk ke Malaysia dan bukannya untuk tujuan transit dan eksport semula. Keterangan tersebut jelas berlawanan dengan keterangan SP1.*

Keputusan

[36] Berdasarkan alasan-alasan tersebut, adalah didapati dan diputuskan bahawa di atas imbangan kebarangkalian, plaintif gagal membuktikan tuntutannya terhadap pihak defendan. Tuntutan plaintif ditolak. Plaintif diperintahkan membayar kos sebanyak RM25,000.00 kepada pihak defendan.

The Memorandum Of Appeal

[24] The plaintiff's grounds of appeal are as per the Memorandum of Appeal which reads (in Bahasa Malaysia and followed by the corresponding English translation) as follows:

(i) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam menolak tuntutan Perayu apabila berpegang bahawa Perayu tidak mempunyai *locus standi* untuk memohon deklarasi tersebut bahawa penyitaan barang di dalam 17 buah kontena oleh Responden-Responden secara berterusan mulai 10.8.2017 sehingga kini adalah menyalahi undang-undang walaupun Perayu telah membuktikan bahawa Perayu sebagai agen mempunyai kepentingan benefisial ke atas barang yang disita.

A

(i) The learned Judge erred in law and fact in dismissing the Appellant's claim when he held that the Appellant had no locus standi to apply for the declaration that the seizure of goods in 17 containers by the Respondents since from 10.8.2017 until it is now unlawful even though the Appellant has proved that the Appellant as an agent had a beneficial interest in the goods seized.

B

(ii) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal berpegang bahawa penyitaan barang adalah menyalahi undang-undang walaupun fakta dan keterangan di dalam perbicaraan membuktikan bahawa barang tersebut telah disita semenjak 10.8.2017 sehingga kini dan tidak dirujuk ke Mahkamah selaras dengan seksyen 128(3) Akta Kastam 1967.

C

(ii) The learned judge erred in law and fact when he failed to hold that the seizure of goods was unlawful even though the facts and evidence in the trial proved that the goods had been seized since 10.8.2017 to date and not referred to Court in accordance with section 128(3) of the Customs Act 1967.

(iii) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan
D fakta apabila berpegang bahawa Perayu tidak boleh menggunakan lesen import minuman keras kepunyaan pihak lain apabila tiada larangan sedemikian di bawah Akta Kastam 1967 kecuali larangan ke atas pindah-milik.

(iii) The learned judge erred in law and fact in holding that the Appellant could
E *not use the liquor import license belonging to another party when there was no such prohibition under the Customs Act 1967 except the prohibition on transfer.*

(iv) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam menolak tuntutan Perayu apabila menerima keterangan
F SD3 secara terus tanpa was-was apabila keterangan dokumentari semasa membuktikan sebaliknya.

(iv) The learned judge erred in law and fact in dismissing the Appellant's claim when accepting SD3's evidence directly without hesitation when the current documentary evidence proved otherwise.

G

(v) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menolak tuntutan Perayu apabila berpegang bahawa keseluruhan keterangan SP1 adalah meragukan dan tidak menyokong tuntutan Perayu walhal ada keterangan dokumentari yang cukup untuk membuktikan kes Perayu pada tahap imbangan kebarangkalian.

H

(v) The learned judge erred in law and fact in dismissing the Appellant's claim when he held that the whole evidence of SP1 was dubious and did not support the Appellant's claim even though there was sufficient documentary evidence to prove the Appellant's case on the balance of probabilities.

(vi) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan
I fakta dalam menolak tuntutan Perayu apabila tidak memberikan keberatan yang sewajarnya kepada autoriti-autoriti yang dihujahkan

oleh Perayu tanpa huraian selanjutnya dan tanpa mempertimbangkan bahawa prinsip undang-undang yang ditetapkan melalui autoriti-autoriti tersebut memadai untuk membuktikan tuntutan Perayu.

(vi) The learned Judge erred in law and fact in dismissing the Appellant's claim when he failed to give due consideration and weight to the authorities argued by the Appellant without further explanation and without considering that the principles of law established through the authorities which are sufficient to prove the Appellant's claim.

(vii) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam menolak tuntutan Perayu apabila gagal mempertimbangkan fakta dan keterangan bahawa konsainor-konsainor melalui surat-suratnya bertarikh 25.4.2018 dan 4.5.2018 telah mengesahkan bahawa Perayu telahpun membuat tuntutan ke atas barang yang disita di dalam 17 kontena tersebut.

(vii) The learned Judge erred in law and fact in dismissing the Appellant's claim when he failed to consider the facts and evidence that the consignors through their letters dated 25.4.2018 and 4.5.2018 had confirmed that the Appellant had already made a claim on the seized goods in the 17 containers which had been seized.

(viii) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila berpegang bahawa Perayu tidak mempunyai milikan (possession) ke atas barang yang telah disita padahal Perayu telah membuktikan melalui pembayaran-pembayaran kepada konsainor-konsainor dengan demikian Perayu mempunyai kepentingan benefisial atas barang yang disita tersebut.

(viii) The learned Judge erred in law and fact in holding that the Appellant had no possession of the goods seized when the Appellant had proved through payments to the consignors that the Appellant had a beneficial interest in the seized goods.

(ix) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam menolak tuntutan Perayu apabila beliau berpegang bahawa surat perwakilan adalah rekaan semata-mata untuk menyokong tuntutan Plaintif padahal penerimaan surat-surat perwakilan tersebut tidak dinafikan diterima oleh Responden-Responden semenjak awal-awal siasatan kes ini dan Responden-Responden juga tidak pernah siasat dengan konsainor-konsainor dan tidak pernah membuat apa-apa laporan polis untuk membuktikan dakwaannya.

(ix) The learned Judge erred in law and fact in dismissing the Appellant's claim when he held that the letter of representation was a fabrication solely to support the Plaintiff's claim even though the receipt of the letters of representation was not denied by the Respondents from the outset and the Respondents also never investigated the consignors and never made any police report to prove their allegations.

A (x) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam menolak tuntutan Perayu tanpa menentukan isu yang perlu diputuskan adalah samaada penyitaan barang tersebut adalah menyalahi undang-undang apabila Responden-Responden telah melupuskan barang tanpa merujuk ke Mahkamah untuk satu keputusan apabila satu tuntutan dibuat oleh Perayu dan/atau
B konsainor-konsainor mengikut undang-undang.

(x) The learned Judge erred in law and fact in dismissing the Appellant's claim without determining the issue to be decided ie, whether the seizure of the goods was unlawful when the Respondents had disposed of the goods without referring to the Court for a decision when a claim is made by the Appellant
C *and/or the consignors in accordance with the law.*

(xi) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam menerima keterangan SD3 yang bercanggahan dengan keterangan dokumentari semasa (contemporaneous documents).

(xi) The learned judge has erred in law and fact in accepting SD3's evidence which
D *contradicted (the contemporary documentary evidence).*

(xii) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam menolak tuntutan Perayu apabila beliau berpegang bahawa Perayu telah gagal membuktikan tuntutannya terhadap Responden-Responden atas imbangan kebarangkalian.

E *(xii) The learned Judge erred in law and fact in dismissing the Appellant's claim when he held that the Appellant had failed to prove his claim against the Respondents on the balance of probabilities.*

(xiii) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam semua hal keadaan dalam menolak rayuan Perayu
F untuk menuntut remedi-remedi sebagaimana dipohon.

(xiii) The learned judge erred in law and fact in all the circumstances in dismissing the Appellant's appeal to seek the remedies as applied for.

Plaintiff's Submissions

G **[25]** It is common ground that the defendants had refused to release the said goods to the plaintiff solely on the ground that plaintiff had no '*locus standi*' to make the claim. As far as the defendants are concerned, NSTE is the consignee and they are the owners of the said goods. Indeed, during the investigation stage and particularly when PW1 was interviewed, it was not
H asserted by the plaintiff that they were the "owner" of the said goods. It is not in dispute that the issue of the plaintiff being the "owner" of the said goods only surfaced at the trial of Suit 55.

[26] According to the plaintiff, D1, D2 and D3 had contended based on the shipping documents that NSTE was the owner of the said goods as they were
I named as the consignee. However, during the trial D1, D2 and D3 admitted that they are aware that NSTE had made a police report dated 4 August 2017 claiming that the said goods do not belong to them.

[27] According to the plaintiff, the evidence adduced at the trial showed that D1, D2 and D3 are aware of the plaintiff's intention to claim for the said goods *via* Azamuddin's letter dated 5 September 2017.

[28] The defendants had also agreed that the consignors had also requested that the said goods be released to the plaintiff *via* their various letters to the defendants. The plaintiff focussed on the following aspects of the testimony by the defendants' witnesses in order to support their entitlement for the said goods to be released to them.

[29] The defendants' witnesses agreed that NSTE did not make any claims for the release of the said goods and that the plaintiff did show any intention to claim the said goods and made a claim *via* its solicitor's letter and the letters from the consignors. The defendants' witnesses admitted receiving the letters from the consignors which state that the plaintiff is appointed as agent for the consignors and the plaintiff did make a claim for the release of the goods to the plaintiff *via* letters dated 5 September 2017, 27 October 2017 and 13 November 2017. D2 said that he doubted the authenticity of the documents but did not make any police report nor took any effort to contact the consignors. D2 also testified that he did not contact the plaintiff after receiving the letters from the consignors.

[30] D2 also admitted that he did not refer the plaintiff's claim to the Magistrate's Court per s. 128 of the Customs Act 1967 despite receiving the letters from the consignors within one calendar month from the date of issuing the notice of seizure to the consignors. D2 agreed that although it has been two years since the seizure of the said goods, the plaintiff's claim was still not referred to the Magistrate's Court.

[31] D2 testified that the said goods were forfeited on 6 June 2018 *via* a forfeiture notice which was issued after the consignors responded to the seizure notice by letters to the defendants. D2 had agreed with the counsel that there are only two legal options available under the Customs Act 1967 which are to either release the said goods or refer the claim to the Magistrate's Court to prove an offence had been committed and the Magistrate would decide on the status of the goods. D2 also agreed that only the Magistrate's Court can forfeit the said goods after a claim has been made by the plaintiff and in this instant case, the claim was not referred to the Magistrate's Court.

[32] D3 said that NSTE did not claim for the release of said goods and agreed with the plaintiff's counsel that there is a police report and a statutory declaration that NSTE is not the owner of the said goods. D3 admitted to carrying out investigations with the consignors and sending them letters. D3 had received letters from the consignors requesting that the said goods to be

A released to the plaintiff. D3 doubted the authenticity of the letters but did not make any police report in regards to the letters. D3 received the consignor's letter to claim within one calendar month from the date of issuance of the seizure notice.

B **[33]** D3 had decided not to release the said goods to the plaintiff nor refer the plaintiff's claim to the Magistrate's Court after receiving the consignor's letters.

[34] D3 agreed with the plaintiff's counsel that he carried out investigations with NSTE but did not do any investigation to determine if NSTE is the owner of the said goods.

C

[35] D3 who received the letters from the consignors did not refer the plaintiff's claim to the Magistrate's Court. D3 also stated that he could not determine if an offence has been committed under the Customs Act 1967 and the said goods still remain seized without being referred to Magistrate's Court.

D

[36] D3 testified that the letters from the consignor were not satisfactory enough for the said goods to be released to the plaintiff. However, D3 then said that there is no format for a claim for the goods under the Customs Act 1967.

E

[37] D1 testified that he is aware that NSTE had agreed that it is not the owner of the said good yet still issued a seizure notice to NSTE. NSTE also did not make any claim for the goods to be released to it. D1 said that despite the investigation, he could not determine that NSTE was in possession of any invoices or receipts for the purchase of the said goods. D1 admitted that he

F did not conduct any investigation with the plaintiff to ascertain whether the plaintiff had any beneficial interest in the said goods. D1 did mention that he received the consignors' letters that the plaintiff had been appointed as their agent to claim for the said goods.

G **[38]** D1 agreed with the plaintiff's counsel that there was no prosecution nor any compound issued to any person with respect to any offence, if any, committed in respect to the said goods. D1 further agreed that the defendants were instructed to issue seizure notices dated 1 April 2018 and 15 April 2018 to the consignors after it had issued a similar notice to NSTE. D1 had also doubted the authenticity of the letters from the consignors but did not make

H any police report with respect to it.

[39] D1 had further agreed that although it has been two years since the seizure, the claim was never referred to Magistrate's Court. D1 admitted that the said goods have been forfeited without the matter being referred to Magistrate's Court and also that the forfeiture notice was issued after the

I letters from the consignors were received by the defendants.

[40] We may now to refer DW3's evidence. DW3 was the sole proprietor of NSTE. He stated that he had made a police report on 4 August 2017 asserting that the said goods did not belong to NSTE and the police report was only made to negate liability on any losses arising out of the seizure. He did not inform the plaintiff that the 17 containers had been seized by the defendants. DW3 did not object when the plaintiff had claimed for the said goods.

[41] DW3 had further admitted that he was the one who made the application to the Kelana Jaya Customs Department to add the consignors' names to its import permit as suppliers. DW3 admitted that NSTE was appointed as the consignor's 'customer' so that the consignor's name could be added to its import permit.

[42] It was submitted for the plaintiff that parties are bound by its pleadings. See *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 (HC). The defendants had not pleaded in their defence that the said goods were forfeited upon issuance of the forfeiture notice dated 6 June 2018 to NSTE.

[43] It was submitted for the plaintiff that in the context of the Customs Act 1967, the said goods cannot be forfeited except with the order of the Magistrate's Court after a claim had been made by a person for the release of the said goods. It was emphasised that under s. 128 of the Customs Act 1967 when there is no prosecution commenced in respect of any seized goods within one month of the seizure and when there is a written claim with respect to the same goods within one month from the issuance of the seizure notice, then such goods shall not be forfeited unless the claim has been referred to the Magistrate's Court and only the court shall have the jurisdiction to either release the goods or to forfeit it.

[44] According to the plaintiff, they had proven that it has beneficial interest in the said goods as an agent, and as such the judge erred in dismissing the claim on the grounds that the plaintiff did not have the *locus standi* to claim for the declaration that the continuous seizure of the 17 containers from 10 August 2017 was unlawful.

[45] In amplification, it was contended on behalf of the plaintiff that the seizure was unlawful as the said goods were seized since 10 August 2017 without being referred to Magistrate's Court pursuant to the requirements of s. 128(3) of Customs Act 1967. It was the plaintiff's position that the plaintiff is not prohibited from using the import permit belonging to NSTE as there is no such restriction under the Customs Act 1967, except with respect to transfer of ownership.

[46] Counsel for the plaintiff criticised the judge's assessment of the evidence and in uncritically accepting DW3's oral evidence which was in conflict with the contemporaneous documentary evidence.

[47] According to the plaintiff, the judge erred in concluding that PW1's oral evidence as a whole was doubtful, when there was sufficient documentary evidence to prove the plaintiff's case on a balance of probabilities.

[48] In particular, counsel for the plaintiff emphasised that the judge failed to consider the fact that the consignors had *via* letters to the defendants dated 25 April 2018 and 4 May 2018 verified and confirmed that the plaintiff had already made a valid claim on the said goods.

[49] In amplification, it was contended that the judge erred in holding that the plaintiff did not have possession of the said goods when there was sufficient evidence to prove that payments were made to the consignors and therefore establishing beneficial interest for the plaintiff to claim the said goods.

[50] According to the plaintiff, the judge erred in holding that the letters from the consignors appointing the plaintiff as its' agent were false documents to support the plaintiff's claim when the receipt of those letters from the consignors was not denied by the defendants. Further, the defendants did not investigate the consignors nor make any police report to substantiate their claims that the letters were false.

[51] It was contended that the judge erred in failing to address his mind to the legal issue that the defendants cannot forfeit the said goods upon a claim being made by the plaintiff and only the Magistrate's Court could decide on the issue of forfeiture of the said goods (per s. 128 of the Customs Act 1967).

[52] Essentially, counsel for the plaintiff anchored his legal argument on the strength of the Court of Appeal's decision in *Modern Freight Express v. Afzarizzal Abdul Wahab & Ors* [2017] 8 CLJ 425; [2017] 6 MLJ 83 (CA) where the Court of Appeal held that:

> Pursuant to sub-s. 128(3) of the Act, where a written claim was made by the appellant for the said goods within one calendar month from the date of seizure and where no prosecution had commenced in respect of the said goods within the same period of time, then on the expiration of the one calendar month from the date of notice of claim, the respondent should release the goods or refer the claim to the magistrate court. As the respondent had failed to do either, the respondents have failed to observe the statutory requirements under s. 128 of the Act.

[53] Counsel for the plaintiff also referred to the case of *Soong Chee Kong v. PP* [1950] 1 LNS 84; [1951] 1 MLJ 5 (HC) where Justice Taylor had referred to s. 108 of the Customs Enactment 1937 (which is in *pari materia* with the provisions of s. 128 of Customs Act 1967) and held:

> Where a claim is made it must first be considered by the Comptroller who may release the goods but cannot forfeit them. This covers cases of seizure on suspicion where circumstances are afterwards explained to the satisfaction of the Comptroller. If he does not release, he must refer the matter to Court.
>
> The Court "examines" the matter; this is essentially a civil proceeding but it is conducted by a criminal court for reasons of convenience – as are maintenance proceedings. The claimant must allege that he is the owner of the goods and that they are not liable to forfeiture. He must first prove his ownership; I do not think this means absolute ownership, it is enough to show that he is entitled to the goods in the ordinary course of commerce, for example as consignee. As soon as he has proved this the onus shifts; the Customs Department must then show that the goods are liable to forfeiture – that is they must justify their seizure. If they fail to justify the seizure the Magistrate releases the goods; he must do so or the whole procedure would be abortive. If, however, they do justify, as, for instance, by proving that the goods were landed but not manifested, then the goods are liable to forfeiture.

[54] In the result, it was contended for the plaintiff that the continuous seizure of the said goods by the defendants without referring the plaintiff's claim to the Magistrate's Court was wrongful and unlawful. And in light of the admission by D1, D2 and D3 that NSTE did not make a claim for the said goods, and since the only party who had claimed for the release of the said goods was the plaintiff, therefore the defendants who refused to release the said goods, ought to have referred plaintiff's claim to the Magistrate's Court for a decision pursuant to s. 128(3) of the Customs Act 1967.

[55] It was argued for the plaintiff that although the defendants had issued the seizure notices dated 1 April 2018 and 15 April 2018 to the consignors who are based overseas, they, as exporters, cannot legally claim the said goods as they do not fall within the definition of 'owner' under the Customs Act 1967. See *Jabatan Kastam Diraja Malaysia & Ors v. Apple International Co Ltd (Japan)* [2017] 8 CLJ 140; [2017] 3 MLJ 421 (CA). Therefore it was argued that the plaintiff is the 'owner' by the definition under s. 2 of the Customs Act 1967 and the plaintiff who had asserted a claim on the said goods has the right to be heard in the Magistrate Court with regards to its claim over the said goods, but was denied the opportunity by the defendants.

[56] In so far as the issue of "*locus standi*" is concerned, it was contended that under the Customs Act 1967, the plaintiff has acquired the right when it asserted the claim as the agent of the consignors and the defendants should have referred the plaintiff's claim to the Magistrate's Court and cannot deny the remedy available under the law to the plaintiff.

[57] In answer to the question of whether the plaintiff is entitled under the law to claim for the seized goods, counsel for the plaintiff referred to the case of *Modern Freight Express* (*supra*) where Tengku Maimun Tuan Mat JCA (as she was then) said:

A Quite apart from the above, sub-s. 128(2) expressly provides that 'any person asserting that he is owner of such good' has a right to claim the goods. The words 'asserting that he is *owner'* in our view are *wider than 'lawful owner'* (pemunya yang sah). As decided by this court in *Mehdi Dadashi Havadaragh*, an unnecessarily restrictive interpretation ought not to be accorded to the words specified in s. 128(2). Further, under s. 2 of
B the Act, the word 'owner' includes 'any person (other than an officer of customs acting in his official capacity) being or holding himself out to be the owner, importer, exporter, consignee, agent or person in possession of, or beneficially interested in, or having any control of, or power of disposition over, the goods. *There was thus no merit in the defendants' averment*
C *that the plaintiff must be 'pemunya yang sah' and that 'rujukan ke mahkamah hanya akan dibuat setelah tuntutan pemunya yang sah menuntut barangan tersebut dalam masa satu bulan dari tarikh penyitaan barangan tersebut'.*

(emphasis added)

[58] It was submitted that at all material times the defendants had sufficient
D notice of the plaintiff's claim. The plaintiff, being the agent for the consignors, and who made the claim had the *locus standi* to seek for the release of the said goods but was denied the right by the defendants.

[59] Counsel for the plaintiff referred to the word 'owner' which is defined in s. 2 of the Customs Act 1967 as 'any person being or holding himself out
E to be the owner, importer, exporter, consignee, agent or person in possession of, or beneficially interested in, or having any control of, or power or disposition over the goods'. Thus, it was submitted that the definition of the word 'owner' under the Customs Act 1967 is wide enough as to include any agent and/or any party with any beneficial interest in the seized goods. During the trial, the defendants had admitted that the plaintiff had shown its
F intention to claim the said goods.

[60] It was argued that as the agent to the consignors, the plaintiff has secured the legal right to claim for the release of the said goods. And, it was accordingly argued that the defendants who had failed and/or refused refer
G plaintiff's claim on the said goods to the court, have not only denied the plaintiff's right to prove ownership over the said goods, but it has also denied the Magistrate's Court the opportunity to examine the matter as required under s. 128(4) of the Customs Act 1967.

[61] In the circumstances, the defendants had failed to prove that an offence
H under the Customs Act 1967 had been committed, because it is the Magistrate who would decide under s. 128(4) of the Customs Act 1967 whether an offence had been committed and whether the said goods were the subject matter of any offence. According to counsel for the plaintiff, the defendants are not empowered under the law to forfeit the said goods when
I a claim has been made for the said goods.

[62] It was argued on behalf of the plaintiff that the judge had misdirected himself in law in holding that the plaintiff is not allowed to use the import permit belonging to another, namely NSTE when there is no such restriction exists under the Customs Act 1967 except as to transfer of ownership. Under reg. 19(3) of the Customs Regulations 1977, every licence as required under reg. 18 to import intoxicating liquor, tobacco or denatured spirit shall not be transferred except with the consent of the Director General.

[63] In this instant case, the plaintiff had used the import licence of NSTE to import the said goods and DW3 on behalf of NSTE had admitted in cross-examination that he made the application to the Kelana Jaya Customs Department to add the plaintiff's consignors' names to its import permit as suppliers. According to the plaintiff, this crucial piece of evidence was not considered by the judge which shows that DW3 had the requisite knowledge of the importation of the said goods by the plaintiff.

[64] Counsel for the plaintiff said that there is no reason for NSTE to include the names of the plaintiff's consignors/suppliers in its import permit, other than to allow the plaintiff to use NSTE's import licence to import the said goods.

[65] Counsel also contended that the judge also failed to take into consideration a material evidence concerning the importation of the consignment of alcoholic beverages by the plaintiff using the import licence of NSTE through the eight containers, which were detained by the Enforcement Division of RMCD Selangor, where the consignment were subsequently released by RMCD Selangor for re-export.

[66] According to the plaintiff, the judge also failed to take into consideration that the police report was lodged by DW3 merely to negate any liability with respect to the said goods seized by the defendants. In fact, DW3 admitted that the goods do not belong to NSTE.

[67] On the whole, the judge came to certain findings of fact predicated on the oral evidence of DW3 but did not notice or consider that DW3's oral evidence openly clashed with the contemporaneous documentary evidence. It was submitted for the plaintiff that judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. See *Tindok Besar Estate Sdn Bhd v. Tinjar Co.* [1979] 1 LNS 119, [1979] 2 MLJ 229 (FC).

[68] It was accordingly submitted for the plaintiff that in the event the seizure is found to be unlawful and wrongful, then the plaintiff shall be allowed to claim for compensation and other incidental damages. Counsel for the plaintiff submitted that if the seizure is unlawful then as per s. 132 of the Customs Act 1967, there shall be no claim to any damages unless such

A seizure was made without reasonable or probable cause. Section 132 of the Customs Act 1967 reads as 'No person shall in any proceedings before any court in respect of the seizure of any goods seized in exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of such proceedings or to any damages or other relief other than an order for
B the return of such goods or the payment of their value unless such seizure was made without reasonable or probable cause.'

Defendants' Submissions

[69] We turn now to the submissions that were made on behalf of the
C defendants. In so far as the defendants are concerned, D1, D2 and D3 acted upon instructions from the Senior Assistant Director of Customs to investigate the containers detained by the Operations Unit RMCD (Johore Bahru) on suspicion of having committed an offence under the Customs Act 1967. Thereafter, seizure notices were issued to NSTE which is the consignee listed in the bill of lading/seaway bill for all containers that had
D been detained. DW3 (from NSTE) assisted in the investigations. During the investigation phase, Azamuddin sent two letters requesting the RMCD Johor Bahru to issue seizure notices to the plaintiff. The solicitor from Azamuddin was called to explain why there was a need to issue seizure notices to the plaintiff since RMCD Johor Bahru's investigations did not find any
E documents relating or connecting the plaintiff to the said goods. Instead, as far as the defendants are concerned, NSTE was the owner of the said goods.

[70] However, no lawyer or representative from Azamuddin came forward to meet either D1, D2 or D3 to provide any explanation. D1, D2 and D3 sent seizure notices to the overseas consignors listed in the bill of lading for
F the containers under investigation. PW1 went before D1, D2 and D3 and submitted the so-called "reply letters" allegedly from the consignors stating that the plaintiff is (allegedly) the agent of the consignors.

[71] However, upon conducting a detailed examination of the "reply
G letters", D1, D2 and D3 had grave doubts in regards to the authenticity of the letters because although the consignors are companies headquartered in other countries (and different companies), the same sentence was used in the letters. Thus, for example, the reply from Brouwerij Martens addressed at Reppelelerweg 1, 3950 Bocholt stated, "We had appointed our agents Sarmiina Sdn Bhd and Sarmiina Trade Ventures Sdn Bhd in Malaysia to
H secure the release of the seized goods." And, in their reply letter, Zaac Holding Pte Ltd (based in Singapore) wrote similarly, "We had appointed our agents Sarmiina Sdn Bhd and Sarmiina Trade Ventures Sdn Bhd in Malaysia to secure the release of the seized goods."

I

[72] It was also suspicious to the defendants that whilst the seizure notices to Apollon Enterprise could not be sent and they in fact received a "no such name/company" response from Singapore Post Ltd, but there nevertheless was a "reply letter" received from Apollon Enterprise with the same response as above, *ie*, "We had appointed our agents Sarmiina Sdn Bhd and Sarmiina Trade Ventures Sdn Bhd in Malaysia to secure the release of the seized goods."

[73] The defendants also found that the signature of the Apollon Enterprise Manager on two pages were different even though, ostensibly, it was signed by the same person (Ching Shuan). And, the word "SINGAPORE" in the letterhead of a letter purportedly from a Singapore – based Apollon Enterprise, was printed as "SNGAPORE", an impossible mistake made by an international company dealing with another country.

[74] Lastly, the defendants found it most suspicious that there was a purported "reply letter", allegedly from the consignor Brouwerij Martens marked for the attention of D2, when D2 never sent any seizure notice to the said consignor. In fact, it was D1 who sent the seizure notice to Brouwerij Martens.

[75] It was emphasised on behalf of the defendants that all of the above suspicious circumstances/evidences were not challenged, repudiated nor explained by the plaintiff during the trial.

[76] In so far as D1, D2 and D3 were concerned, based on the results of their respective and combined investigations, the said goods which were seized belonged to NSTE who was the consignee listed on the bill of lading and inward manifest. There was no explanation from the plaintiff's previous solicitor, Azamudin who was called in to assist in the investigation. It was argued that the plaintiff's failure to call a lawyer from Azamuddin warrants an adverse inference to be made under s. 114(g) of the Evidence Act 1950.

[77] In the result, the plaintiff's declaration that they were "agents" to the consignors listed in the bill of lading and inward manifest was inadmissible because the purported "reply letters" from the consignors were found to be false and fabricated. In addition to the above, it was also contended that it was only after Suit 55 was filed and the trial commenced that the plaintiff raised new matters.

[78] In particular, PW1 testified that the plaintiff is the "buyer" of the seized goods. The allegation that the plaintiff is the buyer was never at any time communicated to D1, D2 or D3 during the investigation stage. Thus, the suggestion that the plaintiff is the buyer was an afterthought by the plaintiff.

[79] During the trial, the plaintiff sought to adduce evidence that there was a brand of liquor that was added to NSTE's import permit and that this was done with the knowledge of NSTE. According to the defendants, this fact was never revealed by any party during the investigation, including by PW1 who dealt with RMCD Johor Bahru during the investigation phase. And the so-called paper trial of payments for the said goods, "Invoices" and "proofs of payment" were not submitted by the plaintiff to D1, D2 and D3 (during the investigation) and were only submitted when the case was filed.

[80] In the result, in so far as the defendants were concerned, they had established that the plaintiff's claim that they are the owner and had "paid" for the said goods were contrived and highly doubtful. In this regard, learned Senior Federal Counsel ("SFC") referred to the evidence of Hew Fook Yong (PW7) in regards to "proof of payment" where he gave vacillating answers as to mode of payment. In this context, PW7 first said payment was by "cash" and then he changed it to payment by "cheque".

[81] At any rate, whether by cash or cheque, there was no proof whatsoever as to any form of payment for the said goods. There was ultimately, no "paper trail" of payment, whether by cash, cheque or by any form of "contra" arrangement. It is therefore argued for the defendants that the testimony of the plaintiff's witness proves that it is very likely that the documents were fabricated for the purpose of this case.

[82] In so far as the release of the eight other containers to STV is concerned, the plaintiff called the investigation officers from RMCD Selangor as their witnesses. The evidence of the investigating officers from RMCD Selangor (plaintiff's witness) who were assigned to investigate the detained containers (at the same time as RMCD Johor Bahru) testified that RMCD Selangor allowed the detained goods to be released to STV and exported abroad. However, this was of no assistance to the plaintiff's case because all the witnesses from RMCD Selangor gave the same evidence, that is, the "release" was pursuant to instructions by the Director of RMCD Selangor and was done without waiting for the investigations to be completed.

[83] Significantly, the Director of RMCD Selangor was not called by the plaintiff to explain the actions (instructions) which were described by the SFC as being very "questionable". It was argued by the SFC that by reason of the plaintiff's failure to call the Director of RMCD Selangor (who allegedly ordered the seized goods to be released for export abroad), or the officer who signed the release order letter, an adverse inference should be drawn against the plaintiff pursuant to s. 114(g) of the Evidence Act 1950.

[84] In so far as the primary issue in contention *ie*, the alleged failure to refer the investigations to the Magistrate's Court under s. 128 of the Customs Act 1967, it was contended by the SFC that based on information obtained

at a material time until the investigation was completed and the goods are forfeited, there was no reason for RMCD Johor Bahru to refer their investigation to the Magistrate's Court under any provision of existing law.

[85] It was also argued by the SFC that the results of the RMCD Johor Bahru investigation showed that the plaintiff had no *locus standi* to claim the seized goods because there were no authentic documents and solid evidence linking the plaintiff to the seized goods.

[86] In so far as the plaintiff's reliance on the Court of Appeal's decision in *Modern Freight Express* is concerned, SFC argued that:

(i) Based on the facts/evidence obtained by D1, D2 and D3, from the plaintiff's representative at the material time, there was no need for plaintiff's purported claim to be referred to court under s. 128 of the Customs Act 1967.

(ii) In this regard, although the plaintiff showed an intent to claim the seized goods, there was no need for D1, D2 and D3 to refer to the matter to the Magistrate's Court as the plaintiff did not fall within the definition of 'any person asserting that he is the owner of such goods' set out in s. 128(2) of the Customs Act 1967.

(iii) As far the case of *Modern Freight Express*, the SFC pointed out that in that case, the Court of Appeal ruled that RMCD should refer to the court in circumstances where the "… the respondents did not object to or dispute the notice of claim from the plaintiff at any time".

(iv) However, in this appeal, based on the results of the investigation, D1, D2 and D3 took the joint decision that the plaintiff's claim did not fall under the claim of s. 128 of the Customs Act 1967.

(v) In other words, RMCD Johor Bahru disputed the plaintiff's claim.

(vi) Further, it was also pointed out that in *Modern Freight Express* (*supra*), the Court of Appeal found that the plaintiff in that case, had made the necessary declaration as to the relevant goods, whereas in the present case there was no such declaration by the plaintiff.

[87] The SFC emphasised that the documents (whose authenticity is questioned) purportedly linking the plaintiff to the seized goods, and the letters allegedly linking the plaintiff as the consignor's "agent", turned out to be false.

[88] In the present case, all invoices, purchase orders and official receipts included in the plaintiff's bundle of documents were only submitted by the plaintiff after the case was filed and after the trial began. These documents were not brought to the attention of D1, D2 and D3 for research, and authentication at the material time when investigations were afoot.

[89] Consequently, it was argued on behalf of the defendants that it is the responsibility of the plaintiff (during the investigation conducted by RMCD Johor Bahru) to prove their interest whether legal or beneficial in respect of said goods, including as the owner so as to be recognised under s. 128 of the Customs Act 1967.

[90] Hence, as far as the defendants are concerned, the plaintiff failed to prove their interest because the documents that allegedly proved the interest (beneficial interest) of the plaintiff in the seized goods, turned out to be fabricated documents. And after a full trial and having seen and heard the respective witnesses, the judge found as a fact that the so-called documents in support of the plaintiff's claim were indeed, dubious and doubtful. In the circumstances, the SFC argued that the judge's findings of fact are unimpeachable and were not "plainly wrong" such as to warrant appellate interference.

Our Decision

[91] As far as the judge was concerned, the sole issue to be determined was whether the plaintiff was entitled to the declaration that was sought arising out of the seizure and forfeiture of the said goods which were in the 17 containers. At para. [18] of the grounds of judgment, the judge said the issue was, "sama ada plaintif berhak kepada perintah deklarasi dan seterusnya berhak mendapatkan ganti rugi seperti mana yang dipohon akibat daripada penyitaan dan lucut hak kan minuman keras yang ada di dalam 17 buah kontena tersebut oleh pihak defendan".

[92] As to the veracity/authenticity of the purported letters from consignors the judge opined as follows at para. [31]:

> [31] Daripada fakta tersebut, bolehlah dibuat inferens bahawa surat-surat tersebut datangnya daripada penghantar yang sama walau pun menggunakan kepala surat yang berbeza. Adalah mustahil atau tidak akan wujud kebarangkalian untuk lima syarikat daripada pelbagai negara akan menggunakan perkataan-perkataan atau ayat-ayat yang sama sekali serupa ketika melantik plaintif sebagai wakil mereka. Daripada inferens tersebut, besar kebarangkaliannya surat-surat perwakilan tersebut adalah rekaan semata-mata dan ianya lebih kepada suatu tindakan yang difikirkan semula (afterthought) untuk menyokong tuntutan yang dibuat plaintif.

[93] In our view, this was a finding of fact based on an audio-visual advantage which was available to the judge and which this court is deprived of. The judge's finding was one which was reasonable in all the circumstances.

[94] In the present case, the notice of seizure was not sent to the plaintiff. Rather, it was sent to NSTE and the consignors. The letters in reply from the consignors were found by the judge to be fake. The net result is that the plaintiff has failed to connect the dots to demonstrate on a balance of

probabilities that they are the "agent" or "owner" (per s. 2 of the Customs Act 1967) *vis-à-vi*s the said goods. In the result, the plaintiff had failed to establish their *locus standi* to make a claim on the said goods.

[95] In answer to the question of whether the seizure of the 17 containers and the said goods on 10 August 2017 was lawful, we are of the view that in light of the circumstances and facts then prevailing, the actions of the defendants in seizing the said goods were lawful. This is particularly so in light of the fact that the named consignee (NSTE) was denying that they are the real consignee or owner of the said goods and disowned the authenticity of the so called "No Objection Letter". In the result, it is quite apparent that when the seizure was conducted on 10 August 2017, the defendants had reasonable and probable cause for doing so. They were not flippant or reckless in their conduct.

[96] Thus, in light of the judge's adverse finding in regards to the impugned letters which the plaintiff was relying upon, it can only be concluded that the judge was implying, without saying so in so many words, that the said letters were "produced in circumstances which would not vouch for its authenticity". See: Raja Azlan Shah CJ (Malaya) in *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136 at p. 137 (FC).

[97] In our view, it cannot be said that the judge's conclusion on this point was one which no reasonable tribunal similarly circumstanced would have arrived at. It is not a finding which is "plainly wrong" in any sense.

[98] In so far as the Court of Appeal's decision in *Modern Freight Express* is concerned, it needs to be highlighted that the facts there were quite different. What happened in that case is this.

> [3] On or about 16 September 2015 and 17 September 2015, *the plaintiff was appointed and instructed by six different consignors to take possession and to manage the declaration, clearance and shipping of the consignments of 'Beer and Apple Cider' ('the said goods').*
>
> [4] The said goods, conveyed in 40 containers, were shipped by the consignors from Vietnam to the Northport, Port Klang to be shipped in stages to *the respective consignees in Singapore.*
>
> [5] Pursuant to the Free Zone Act 1990, Northport, Port Klang is a free zone area where the said goods is not subjected to payment of any customs duty or taxes when the said goods were brought into the free zone area from outside Malaysia. The authority responsible for the administration, management and operation of all activities in the Northport free zone including permitting the movement of goods into and out of the free zone area is the Port Klang Authority or Lembaga Pelabuhan Klang ('LPK').

A [6] *For purposes of removing the said goods in stages to Singapore based on the availability and confirmation of the vessels, the plaintiff had made the necessary declaration of the said goods in the prescribed forms which was duly approved by the LPK.*

[7] On 13 November 2015, the plaintiff, upon making an enquiry with
B the customs officer at the enforcement division, was informed that the said goods in the 40 containers had been seized by the enforcement division of the customs department on 9 November 2015. At the material time, the first defendant was the senior officer of customs, holding the post of an assistant director in the Enforcement Division, Customs Department, Selangor.

C [8] By a letter dated 19 November 2015, the plaintiff through its solicitors, made a claim to the State Director of Customs, Selangor ('the second defendant') pursuant to s. 128(1) of the Act, demanding the release of the said goods. The defendants did not release the goods. Neither did the defendants refer the plaintiff's
D claim to the magistrate's court for decision after the expiration of one month from the date of the notice of claim.

[9] On 30 November 2015, *the plaintiff however received a notice of seizure* dated 27 November 2015 issued by the first defendant pursuant to s. 114 of the Act. *The notice which was specifically addressed to the*
E *plaintiff, stated among others that 'sebarang tuntutan hendaklah dikemukakan secara bertulis dalam tempoh satu bulan dari tarikh penerimaan notis ini'.*

[10] *Vide* a letter dated 30 November 2015, the plaintiff through its solicitors made a claim for the release of the said goods. The defendants failed to release the said goods and failed to refer the
F matter to the Magistrate Court. There was no prosecution preferred against the plaintiff in respect of the said goods.

[11] The plaintiff contended that the continuous seizure of the said goods was made without any reasonable and probable cause and that the defendants have a statutory duty to refer the plaintiff's
G claim to the Magistrate Court for decision on the expiry of one calendar month from the date of seizure of the said goods.

(emphasis added)

[99] We agree with the submission that was made by the SFC in that unlike *Modern Freight Express*, the plaintiff here was quite "incognito" and surfaced
H only after the seizure was carried out. This looks very nefarious and sinister to say the least and has all the makings and trappings of an illicit practice within the shipping industry. But that is a matter for the RMCD to address in the appropriate way. In so far as we are concerned, the release of the eight containers and the said consignment to STV (which purportedly replaced
I NSTE as consignee) which was done by the top management of RMCD Selangor is not a precedent which has to be followed as the so-called release is not in our view, free from controversy.

[100] Having regard to the factual matrix as manifested by the oral and documentary evidence and upon a true perspective of the facts as they presented themselves at trial, the judge found that the so-called clutch of letters which were said to have been issued by the consignors were contrived ("rekaan semata-mata") (see para. [31] – grounds of judgment). The judge also concluded that the so-called NSTE "no objection letter" was fake in that the signature which purports to be that of DW3 was a forgery. (See paras. [33] and [34] of the grounds of judgment). The judge also opined (rightly in our view) that the use of STV's import permit to "sanitise" the importation of the said goods could not be countenanced.

[101] In this regard, the judge was of the view that an import permit cannot be used *ex-post facto* to bring in the said goods. He said relevantly,

> [32] Begitu juga dengan keterangan tentang pelantikan STVSB sebagai agen oleh konsainor-konsainor. Walau pun STVSB mempunyai lesen import pada masa perwakilan dibuat, tindakan tersebut tidak sama sekali boleh mengesahkan bahawa minuman keras di dalam 17 buah kontena tersebut adalah milik plaintif. Lagi pun, penggunaan lesen import tidak boleh dikebelakangkan kesannya. Suatu lesen import diperlukan pada masa barangan diimport dan bukannya selepas barangan di dalam 17 buah kontena tersebut tiba dan berada di pelabuhan.

[102] In so far as the plaintiff's assertion that the said goods were brought into the free zone, West Port, Port Klang and were meant to export to foreign destinations, the judge found this to be incorrect as the inward manifest showed that the consignment was meant for import into Malaysia and not merely in-transit for re-export. In this regard, the judge said:

> [35] Akhirnya, SP1 juga mendakwa bahawa plaintif terlibat membawa masuk 17 buah kontena tersebut ke dalam zon bebas Pelabuhan Barat, Pelabuhan Klang untuk tujuan transit dan akan dieksport semula kepada pelanggan di negeri-negeri Iain. Lihat jawapan kepada soalan 2 dan 3 pernyataan saksi SP1. Namun begitu, menurut keterangan dokumentari iaitu pengikraran dagangan dalam semua dokumen 'inward manifest' yang dikemukakan jelas menunjukkan bahawa konsainan adalah untuk diimport masuk ke Malaysia dan bukannya untuk tujuan transit dan eksport semula. Keterangan tersebut jelas berlawanan dengan keterangan SP1.

[103] Having undertaken an analysis of the evidence, the judge concluded that the documents relied upon by the plaintiff were doubtful. In so far as PW1's evidence is concerned, the judge implied that PW1's evidence was incredible and unbelievable. This may be gathered from the following parts of the grounds of judgment where the judge said:

A [26] Selain daripada itu, adalah didapati bahawa keterangan SP1 berhubung dengan pemilikan minuman keras di dalam 17 buah kontena tersebut sangat meragukan. Terdapat percanggahan yang nyata di dalam keterangan yang dikemukakan semasa plaintif cuba membuktikan tuntutan. Plaintif buat dakwaan bahawa minuman keras di dalam 17 buah kontena tersebut adalah miliknya dengan B cuba kemukakan dokumen pembelian. Pada masa yang sama, plaintif turut mendakwa bahawa dia adalah agen atau wakil kepada konsainor-konsainor bagi tujuan membuat tuntutan dan pelepasan minuman keras yang disita pihak defendan.

[27] Menurut SP1, setelah menerima notis-notis sitaan daripada pihak C defendan pada sekitar bulan April 2018, konsainor-konsainor telah mengutus surat memberi notis kepada pihak defendan menyatakan bahawa mereka melantik plaintif sebagai agen mereka dan STVSB sebagai pemegang lesen import di Malaysia bagi tujuan membuat tuntutan dan menguruskan pelepasan minuman keras di dalam 17 buah kontena tersebut. Surat-surat pelantikan tersebut dapat dilihat D di muka surat 183 hingga 192 Ikatan B.

[28] Plaintif tidak sepatutnya berdolak-dalik (blow hot and cold) di dalam mengemukakan dan membuktikan tuntutan. Sekiranya benar plaintif telah membeli kesemua minuman keraG di dalam 17 buah kontena tersebut, sudah tentulah kesemua minuman keras tersebut E menjadi milik plaintif. Oleh itu, adalah didapati bahawa tidak ada keperluannya untuk konsainor-konsainor tersebut melantik plaintif bagi membuat tuntutan bagi pelepasan minuman keras yang ada di dalam 17 buah kontena tersebut.

[29] Berdasarkan percanggahan keterangan tersebut, timbul keraguan ke F atas dakwaan plaintif yang mendakwa bahawa dia ialah pemilik minuman keras di dalam 17 buah kontena tersebut. Adalah didapati bahawa alasan berkenaan pelantikan plaintif sebagai agen kepada konsainor-konsainor tersebut jelas bertentangan dengan pliding plaintif sendiri. Harus diingat, di dalam permohonan untuk mendapatkan perintah deklarasi plaintif telah menyatakan bahawa G minuman keras yang disita pihak defendan adalah miliknya dan bukannya mewakili konsainor-konsainor tersebut untuk buat tuntutan pelepasan.

[104] Essentially, the defendants' position may be gathered from D1's evidence, per his witness statement (at trial) which reads relevantly as H follows:

> iii. Dalam tempoh siasatan, Plaintif melalui Tetuan Azamuddin & Co. ada menghantar dua pucuk surat pada 5 September 2017 (rujuk m/s 114) dan 13 November 2017 (rujuk m/s 116), masing-masing meminta pihak Kastam mengeluarkan notis sitaan kepada Plaintiff. I
>
> Permintaan ini tidak dibenarkan atas sebab siasatan saya menunjukkan nama konsaini bagi kesemua kontena tersebut adalah syarikat No Signboard Too Enterprise. (rujuk muka surat 54, 58, 60, 70 & 75)

Sehingga hari ini Plaintif tidak ada mengemukakan bukti bahawa mereka adalah pemilik barangan di dalam kontena tersebut.

5. *Menurut Plaintif pada atau sekitar hujung November 2017, Saravanan a/l Chellapan sebagai wakil plaintif telah menyerahkan satu surat yang kononnya daripada konsainor-konsainor barangan terbabit kepada defendan ke-4 memohon kebenaran penukaran konsaini dalam Bill of Lading daripada pemegang lesen import tersebut kepada Sarmiina Trade Ventures Sdn Bhd. Apa status permohonan tersebut?*

   Menurut rekod yang saya mempunyai akses, tidak ada permohonan tersebut dan saya dapati salinan surat-surat konsainor yang ada di dalam fail diragui kesahihannya.

6. *Menurut rekod, siapakah konsainor barangan tersebut?*

   Merujuk kepada Bill of Lading/Seaway Bill (rujuk m/s 16, 17, 18, 19 & 20) nama-nama konsainor (shipper/exporter) adalah Zaac Holding, Brouwerij Martens dan Bavaria NV.

7. *Adakah konsainor-konsainor tersebut dihubungi?*

   Saya telah menghantar surat-surat notis sitaan kepada konsainor-konsainor tersebut. (rujuk m/s 24, 27 & 29) bagaimanapun saya percaya surat-surat jawapan yang kononnya daripada konsainor tersebut adalah tidak sahih kerana:

   i. Bagi syarikat Zaac Holding, Bavaria NV, Brouwerij Martens NV (rujuk m/s 184,185,186,190,) surat jawapan daripada syarikat tersebut diserah kepada Penguasa Kastam Ahmad Syukri bin Zolkilfee oleh seorang lelaki india yang mendakwa mewakili syarikat Plaintif. Oleh itu serahan surat jawapan tersebut bukan diterima daripada konsainor tersebut.

      Penelitian surat jawapan daripada Brouwerij Martens NV menunjukkan bahawa surat tersebut bukan ditujukan kepada saya tetapi sebaliknya kepada Penguasa Kastam Ahmad Syukri bin Zolkiflee. Ini telah menimbulkan keraguan bahawa surat tersebut benar-benar daripada Brouwerij Martens NV kerana Penguasa Kastam Ahmad Syukri bin Zolkiflee tidak pernah berurusan dengan mereka.

   ii. Penelitian mendapati surat-surat tersebut (rujuk m/s 184, 185, 186 & 190) seolah-olah disediakan oleh pihak yang sama.

8. *Dalam kes ini Plaintiff mendakwa telah menggunakan lesen import daripada syarikat No Signboard Too Enterprise untuk tujuan pengimportan minuman keras. Adakah amalan ini dibenarkan?*

   Plaintif tidak dibenarkan menggunakan lesen import daripada mana-mana syarikat kecuali dengan izin Ketua Pengarah Kastam Malaysia di mana dalam kes ini tidak ada bukti keizinan tersebut diperolehi. (rujuk butiran 1 di m/s 80)

A Tambahan pula lesen import Syarikat No Signboard Too Enterprise yang kononnya diguna pakai oleh Plaintif tidak meliputi jenama minuman keras yang disita.(rujuk m/s 81-111 yang merupakan lampiran kepada lesen import)

Minuman keras yang disita boleh dirujuk di m/s 238. Minuman B keras yang terlibat di dalam siasatan saya adalah di Bil. 1, 2, 3, 4 dan 5.

9. Apakah kesimpulan siasatan Tuan?

i. Tiada bukti menunjukkan bahawa Plaintif adalah pihak yang sah bagi menuntut minuman keras yang disita di dalam kelima- C lima kontena tersebut.

ii. Plaintif gagal menunjukkan kaitan syarikat Plaintif dalam mana-mana manifes dan bill of lading.

iii. Surat-surat (kononnya daripada konsainor-konsainor) yang dikemukakan oleh Plaintif diragui kesahihannya.

D

iv. Pada masa pengimportan minuman keras tersebut Plaintif tidak mempunyai lesen import minuman keras dan tiada bukti telah mendapat izin Ketua Pengarah Kastam bagi menggunakan lesen import syarikat lain.

E **[105]** And in re-examination, D1's evidence was as follows:

P/D: Apa tujuan notis-notis sitaan dikeluarkan kepada konsainor-konsainor, Tuan Gerry?

SD4: Yang Arif, tujuannya adalah untuk makluman kepada ... sebagai satu makluman kepada konsainor-konsainor tentang barangan F mereka telah disita oleh pihak Kastam.

P/D: Tuan telah ditanya tentang surat-surat yang kononnya daripada konsainor. Kenapa Tuan tak anggap surat tersebut sebagai Notis Tuntutan?

SD4: Boleh ulangi?

G

P/D: Sebab Tuan telah menerima surat-surat daripada konsainor, daripada oversea itu. Surat-surat itu di muka surat 186 untuk kes Tuan, 184, 185, 186. Dan surat tersebut kononnya melantik Plaintif sebagai ejen untuk menuntut?

Kenapa Tuan tidak menganggap surat tersebut sebagai Notis H Tuntutan yang sah daripada Plaintif?

SD4: Yang Arif, I doubt all these letters has been fabricated with all the signatures are the same and ... the way that letters are been written, to me is all ... with all the same body and same font and all that, I feel that we don't have to take action on this part, to inform the I ... and to me to appoint Sarmiina sebagai seorang ejen, at this moment of time, he doesn't have any license, his name doesn't

appear in any of the Bill of Lading, manifest and from the shipping company that we recorded the statement from, all the point point to No Signboard. And I believe that No Signboard is a real owner of all these goods.

P/D: Tuan yakin No Signboard adalah pemilik barangan disita dan Tuan tidak Tuan meragui surat-surat daripada konsainor. Dengan kepercayaan sedemikian, with that believe, adakah keperluan untuk Tuan merujuk kes ini ke Mahkamah?

SD4: Yang Arif, selepas kes ini dibawa kepada satu round table discussion bersama IO dan Ketua Jabatan Unit Penguatkuasaan, kami berpendapat surat yang dikeluarkan adalah tidak benar. So dari itu kes ini adalah dianggap sebagai kes rampasan. Dan barang dibuat lucut hak saja.

[106] In all the circumstances, the plaintiff has not satisfied us that the learned judge had mis-appreciated the evidence and was "plainly wrong" in arriving at his decision. We find that the learned High Court Judge has considered and evaluated the evidence before him and found that the plaintiff has failed to prove on the balance of probabilities of its claim. We find no error that warrants an appellate intervention. Indeed, as an appellate court, we should be slow in interfering with the judge's finding of facts unless the judge is plainly wrong. In our view, the judge's finding was not plainly wrong.

[107] In this case, the judge had carefully examined the entire matrix of facts and based on the documents and contemporaneous conduct of the parties and oral testimony of the witnesses. Having considered the matter carefully and having due regard to the comprehensive written submissions and the extensive oral clarification before us, we find that there is no appealable error to warrant any appellate interference in this case.

[108] In our view, the judge, having considered all the evidence, was fully entitled to reach his evaluative judgment as per the grounds of judgment. Although the plaintiff criticised the judge's approach and reasoning, we are not persuaded that the judge's approach was erroneous, the reasoning flawed or the conclusions wrong. In the result, we agreed with the judge that ultimately the plaintiff failed to prove on a balance of probabilities that they had requisite *locus standi* to make a claim with respect to the said goods. As stated earlier, the defendants had reasonable and probable cause for seizing the 17 containers and the said goods.

[109] We conclude by referring to the reminder by the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, [2020] 1 LNS 1060 [2020] 12 MLJ 67, [2020] MLJU 1469, [2020] 8 AMR 227 (FC):

A

> As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

B

[110] Therefore, the appeal is dismissed and the decision of the High Court is affirmed. We further awarded cost of RM15,000 to the defendants (respondents).

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